

Procurement Advisory No. 104 B

FAR Class Deviation:

Prohibition Against Contracting with Corporations that have an Unpaid Delinquent Tax Liability or a Felony Conviction under any Federal Law.

1. SUMMARY

This advisory extends and revises a class deviation to the Federal Acquisition Regulation (FAR) to prohibit the use of funds to enter into a contract with any corporation that has any unpaid Federal tax delinquencies or certain felony convictions unless the Department has considered suspension or debarment of the corporation and the Department has made a determination that this further action is not necessary to protect the interests of the Government.

Procurement Advisory 104. The requirement was originally prescribed in the Consolidated Appropriations Act of 2012 (Pub. L. 112-74) and the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55).

Revision A. Advisory Revision A extended the prohibition beyond Fiscal year 2012 to include subsequent fiscal years.

Revision B. Revision B of the advisory extends the requirement as prescribed in sections 744 and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235). For Fiscal Year 2015, the provisions were moved from the individual agency sections of the Act and into the government-wide provisions section. The centralized provision also extends beyond FY2015 to include all other appropriations acts. This means that the new centralized provisions apply across the government to all appropriated dollars and to all agencies and offices in a uniform manner.

FAR Rule. A rule amending the FAR will be issued by the FAR Council in the near future. This has been assigned as FAR Case 2015-011. In the meantime, agencies have been encouraged by the Civilian Agency Acquisition Council to issue a FAR class deviation to implement the appropriations statute. This class deviation remains in effect until incorporated into the FAR or otherwise rescinded.

2. REFERENCES

- (a) Federal Acquisition Regulation (FAR) 48 CFR, Part 9, *Contractor Qualifications*.
- (b) Agriculture Acquisition Regulation (AGAR) 48 CFR Chapter 4, Section 409.471, provision at 452.209-70 and clause at 452.209-71.
- (b) Sections 744 and 745, Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), as amended and/or subsequently enacted.
- (c) Civilian Agency Acquisition Letter 2014-01, dated November 21, 2013.
- (d) Civilian Agency Acquisition Letter 2012-02, dated January 27, 2012.

3. DISCUSSION

Effective immediately, funds made available by the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) or any other Act, may not be used to enter into a contract with any corporation that –

- has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware

of the unpaid tax liability, unless the Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government; or

- was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless the Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

4. ACTIONS

Contracting officers shall include the attached provision (Attachment 1) in all solicitations that will use funds made available by the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) or any other Act, including solicitations for the acquisition of commercial items under FAR part 12, and shall take the following actions and apply the following restrictions:

- (a) The contracting officer shall **not** award a contract to any corporation that –
 - (1) fails to comply with the requirement to fill out the representation, **or**
 - (2) provides an affirmative response to either of the representations in the provision at 452.209 – 70 (included in Attachment 1), regarding any unpaid Federal tax liability or a conviction of a felony criminal violation of Federal law within the preceding 24 months,
- (b) Upon receipt of an affirmative response to the representation, contracting officers shall refer the incident to the Head of the Contracting Activity Designee (HCAD) who shall follow the notification direction below in paragraph (e) ***Suspension or Debarment Determination***, and (e)(2) ***Notification***.
- (c) **For new awards made using fiscal year 2015 and subsequent fiscal year funds.** Contracting officers shall insert the provision prescribed at 452.209 – 70, *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction* (See Attachment 1), in all solicitations and contracts, including those for the acquisition of commercial items under FAR Part 12.
- (d) **For solicitations already released without a representation, where proposals/offers have already been received, but where award has not yet been made.** The contracting officer shall issue an amendment to the solicitation in writing (e-mail is acceptable), notifying every offeror who submitted a proposal/offer about the new appropriations restrictions and requesting them to submit signed representations (provision at 452.209-70), to be added to their proposals/offers.

The notification sent to all offerors should read:

"This is to notify you of recent award prohibitions contained in sections 744 and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) regarding corporate felony convictions and corporate tax delinquencies. Under the Appropriations Act, no awards can be made to any corporation (for profit or non-profit) that has a tax delinquency or felony conviction as defined in the Appropriations Act and described in the attached representation. To comply with these provisions, all offerors are required to return the attached representation to [insert name and submission address] no later than [insert date and time]. Please note that if you have a tax delinquency or felony conviction, as defined in the Appropriations Act and described in the attached representation, you are not eligible for award. If you are ineligible for award because of these prohibitions it is possible that you can regain eligibility for award, but only if the suspension and debarring official considers your tax delinquency and/or felony conviction and determines that suspension or debarment is not necessary to protect the interests of the Government."

The representation provision at 452.209-70 shall be included with the notification.

(e) Suspension or Debarment Determination.

(1) **Determination.** An award may be made despite the restrictions in the previous paragraph (paragraph c) if the debarring and suspending official has considered suspension or debarment of the corporation and has made a written determination that this action is not necessary to protect the interests of the Government.

(2) **Notification.** In the event of an affirmative representation, the contracting officer shall refer the representation to the Head of the Contracting Activity Designee (HCAD) who shall notify in writing the Chief of the Procurement Policy Division, Office of Procurement and Property Management (OPPM) for the consideration of the debarring and suspending official. Included in the notification shall be the name and address of the corporation, names of officers or agents, and a summary of the incident including any additional information needed to assess the incident.

(3) **Award.** Upon an affirmative representation by a corporation, an award may not be made unless –

- (i) the Senior Procurement Executive, who is also the Director of the Office of Procurement and Property Management (OPPM) and the Department's suspending and debarring official, has considered suspension or debarment of the corporation, **and**
- (ii) the Senior Procurement Executive has made a written determination that this further action is not necessary to protect the interests of the Government.

(4) **Award to Another Offeror prior to any Suspension or Debarment Determination.** While awaiting final guidance, our best advice is that these prohibitions do not require an agency to delay award to another eligible offeror pending review of the ineligible offeror by the suspending and debarring official but the agency certainly has the discretion to delay award if it wishes to do so.

(f) **Existing Contracts.** For existing contracts, no modification adding the representation will be required. If, during the course of administering an existing contract, a contracting officer becomes aware of a felony or tax delinquency for a corporate contractor, the contracting officer shall raise this issue to the HCAD. The HCAD shall contact the Chief, Procurement Policy Division, OPPM, who will consult with the Office of the General Counsel.

(g) **Issuance of Task or Delivery Orders or Modifications that Add Funds Under Existing Contracts with Corporations.** While existing contracts do not need to be modified to add the representation or assurance at 452.209-70, changes to existing contracts that obligate previously unobligated fiscal year 2015 appropriated funds will have to include the new representation or assurance. Changes that will require a contractor under an existing contract to complete the new representation or assurance include:

- (1) issuance of a task or delivery order under an existing indefinite quantity-indefinite delivery (IDIQ) contract,
- (2) issuance of an order under an existing blanket purchase agreement or basic ordering agreement, **or**
- (3) issuance of a modification that adds previously unobligated fiscal year 2015 appropriated funds to an existing contract.

Procurement Advisories are issued by the Procurement Policy Division of the Office of Procurement and Property Management, Departmental Management, USDA, and are posted on the World Wide Web site at: <http://www.dm.usda.gov/procurement/policy/advisories.html> . If you have questions or comments regarding this advisory, please send an email message to procurement.policy@dm.usda.gov.

EXPIRATION DATE: Effective upon issue date until canceled. **[END]**